Information
Technology &
Telecommunications

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VIA ELECTRONIC FILING
Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **Ex Parte Letter**, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84

Dear Secretary Dortch:

The City of New York ("the City") respectfully submits this ex parte letter in response to the Commission's public issuance of a potential Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment (the "draft Wireline Notice") and Notice of Proposed Rulemaking and Notice of Inquiry (the "draft Wireless Notice") (collectively, the "draft Notices") in the above-referenced dockets. There are numerous matters raised in these draft Notices that could be the subject of comment by the City. In this letter, however, the City focuses on one matter that, if allowed to appear in its current form in any ultimately issued Notices, is particularly likely to create widespread confusion and waste the time and resources of the industry, State and local governments, and the public. The City therefore strongly urges the Commission to either rewrite or omit the language and discussion of this particular matter in any ultimately issued Notices.

The particular matter of concern to the City relates to an inaccurate representation of the language in Section 253(a) and the current state of the law interpreting that statutory provision. Specifically, the Notice implies an ongoing split among federal circuit courts in which some circuits hold a current view that 253(a) can be plausibly read to bar state or local requirements that "might" prohibit or effectively prohibit provision of a telecommunications service. The second sentence of Paragraph 109 of the draft Wireline Notice then inaccurately re-words Section 253(a) in a manner that invites that interpretation and implies an ambiguity as to the statute's meaning.

However, the Circuit split implied in the Wireless Notice does not exist. It is true that years ago a Ninth Circuit court panel tried to read Section 253(a) in a manner that would appear to authorize a finding of preemption of any State or local law that might conceivably prohibit telecommunications services in the future. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) (hereinafter, "*Auburn*"). But that opinion is no longer good law because it was subsequently rejected, unanimously and in no uncertain

terms, by eleven Ninth Circuit justices sitting *en banc* in *Sprint Telephony PCS, L.P. v. County of San Diego* 543 F.3d 571 (9th Cir. 2008), *cert. denied*, *Sprint Telephony PCS, L.P. v. San Diego County*, 557 U.S. 935 (2009), in a decision that pointed out that the earlier *Auburn* panel had inaccurately re-stated the language of Section 253(a) (in a manner similar to that used in the second sentence of Paragraph 87 of the draft Wireless Notice).

The *Sprint Telephony* decision followed the 8th Circuit's own strenuous rejection of *Auburn* in *Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528 (8th Cir. 2007), *cert. denied*, *Level 3 Communications., LLC v. City of St. Louis*, 557 U.S. 935 (2009): "…[N]o reading of Section 253(a) results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit [telecommunications] services . . . Thus, we hold that a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." 477 F.3d 528, at 533. The *Sprint Telephony* and *Level 3* readings of the word "may" in Section 253(a) as meaning exclusively "is permitted to", and not "might", has since been widely recognized as the *only* correct understanding of Section 253(a), including within the Second Circuit's jurisdiction here in New York (notwithstanding the draft Wireless Notice's incorrect suggestion that a different view currently prevails here).[1] See the reference adopting the *Sprint Telephony* approach (and describing it as "persuasive") in *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown,* 603 F. Supp. 2d 715 (S.D.N.Y. 2009) at 731-732 (affirmed by *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown,* 612 F.3d 97 (2d Cir. 2010)). Also see *Best Payphones, Inc. v. City of New York*, 2015 U.S. Dist. LEXIS 174901 (E.D.N.Y.2015), at footnote 18, citing the *Sprint Telephony* and *St. Louis* understanding of 253(a).

A district court in the Fifth Circuit adopted the *Level 3* and *Sprint Telephony* approach, not the discredited *Auburn* reading. *See City of New Orleans v. BellSouth Telcoms., Inc.,* 2011 U.S. Dist. LEXIS 60925 (E.D. La. June 7, 2011).[2] Just last year, in *Zayo Group, LLC v. Mayor & Balt.*, 2016 U.S. Dist. LEXIS 77700 (D.Md. Jun. 14, 2016), within the Fourth Circuit's jurisdiction, the court relied on the *Level 3* and *Sprint Telephony* approach to 253(a), not the discredited *Auburn* approach. The highest courts of Nebraska and New Hampshire have both embraced the now prevailing *Level 3* and *Sprint Telephony* reading. *See TracFone Wireless v. Nebraska Pub. Serv. Comm.*, 279 Neb. 426 (2010); *Appeal of Bretton Woods Tel. Co.*, 164 N.H. 379, 386-87 (2012).

In short, in case after case throughout the nation, the readings of Section 253(a) in *Level 3* and *Sprint Telephony* have been fully embraced. The City is unaware of any judicial decision since *Sprint Telephony* that has read the word "may" as meaning "might". To the contrary, the U.S. Solicitor-General's brief to the Supreme Court regarding the certiorari petitions filed in the *Level 3* and *Sprint Telephony* cases stated (accurately and indeed prophetically) as follows: ". . . [S]ince the Second and Tenth Circuits' decisions relying on Auburn were issued, the Eighth Circuit has declined to follow Auburn, and the *en banc* Ninth Circuit has overruled it. In light of those developments, it is unlikely that additional circuits

[1] All the cases cited in the draft Wireless Notice on the purported split in the Circuits predate *Level 3* and *Sprint Telephony.*

[2] "Turning to subsection (a), whether the imposition of the unjust enrichment payments on BellSouth 'may prohibit or have the effect of prohibiting the ability of BellSouth to provide telecommunications services, the Court finds no such prohibition. Since the Fifth Circuit has not directly addressed the meaning of subsection (a) and the statute itself contains no defining language, the Court looks to the recent and well-grounded interpretations espoused by the Eighth and Ninth Circuits. These Circuits identically conclude that pursuant to the FTA, 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.'" (This decision was affirmed in part and reversed in part on other grounds. *See* 2012 U.S. App. LEXIS 15786 (5th Cir. July 31, 2012))

will follow the repudiated Auburn decision, and those that already have done so may reconsider the issue. Indeed, even the petitioners here do not attempt to defend the interpretation of Section 253(a) articulated in Auburn."[3]

The results reached by all these courts derive from a plain language review of the statute's text. The impossibility of reading the word "may" in Section 253(a) as meaning "might" requires only a look at the available meanings of the word "may". The word "may" can mean either "might possibly" or "is permitted to", depending on the context. Substituting the latter possibility reads as follows:

"No State or local statute or regulation, or other State or local legal requirement, [is permitted to] prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

With this definition of "may", Section 253(a) reads as it is generally understood, as a preemption of certain State and local statutes, regulations and legal requirements.

That reading can be compared with reading 253(a) with "may" meaning "might possibly":

"No State or local statute or regulation, or other State or local legal requirement, [might possibly] prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

With this reading, the sentence becomes incoherent, lacking any preemptive effect at all because it seems to lack any reference to what States and local governments can or cannot do. The "might possibly" definition of "may" in Section 253(a) is simply unsustainable and would render 253(a) incoherent. Section 253(a) can be misleadingly excerpted by quoting the section beginning with the word "may", so as to leave the impression that "may prohibit" means "might possibly prohibit". But such incomplete quotation distorts the meaning of the sentence as a whole by omitting the language that precedes "may" ("No State or local statute or regulation [etc.] may . . . ."), which language unambiguously establishes that "may" means "is permitted to", not "might possibly" in the context of the sentence as a whole.

In summary then, (1) there is *no* coherent reading of Section 253(a) in which the word "may" is read to mean "might", and (2) courts throughout the country since *Level 3* and *Sprint Telephony* have unanimously recognized that point. The City therefore urges the Commission to, in any final version of the draft Notices that it might issue, avoid confusion and wasted effort by deleting the inaccurate and deceptive paraphrasing of Section 253(a) in the second sentence of Paragraph 109, and the first and second sentences of Paragraph 110,[4] of the draft Wireline Notice and the inaccurate description of the

[3] 2008 U.S. Briefs 626 at 17; 2009 U.S. S. Ct. Briefs LEXIS 1796 at 29.

[4] The use of the word "inhibit" in the final sentence of Paragraph 110 of the draft Wireline Notice is also inaccurate and should be replaced in any final version of such a Notice. Although the Commission has previously suggested an interpretation of Section 253(a) based on whether a particular law or regulation "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" (*California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol. 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14209, para. 38 (1997) (*California Payphone*)), that is not the same as re-writing the "prohibit or effectively prohibit" standard in the Telecommunications Act with a new "inhibit" standard that is not in

state of judicial analysis in the second sentence of Paragraph 87 of the draft Wireless Notice suggesting legal uncertainty on a settled matter where no uncertainty remains.

Sincerely,

/s

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the statute. If the *California Payphone* gloss on 253(a) is supportable, it is only so if understood as a whole, not piecemeal. As a whole, the *California Payphone* gloss can be said to reflect the legislative intent of Section 253(a) – that States and local governments not use their own regulatory authority to re-produce the kind of monopoly control of telecommunications services that existed in the U.S. prior to 1984. But that is not a standard that simply replaces "prohibit or effectively prohibit" with the word "inhibit". As the Commission said in *California Payphone* itself, explaining its conclusion that no violation of Section 253(a) had been proven: "The City's contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. In other words, the City's contracting conduct would have to ***actually*** prohibit or effectively prohibit the ability of a payphone service provider to provide service . . . . [emphasis added]." In applying this standard, the Commission in *California Payphone* explained that merely an impact on a company's revenue or the imposition of a high franchise revenue-sharing requirement were not enough to support a finding of a 253(a) violation: ". . . There is no basis on this record to conclude that payphone service providers other than Pacific Bell lack a realistic and viable opportunity to install payphones outdoors on the public rights-of-way or [alternatively] indoors on private property in the Central Business District. Thus, the present record does not support a finding that the Ordinance -- by its terms or its effect, alone or in conjunction with the Payphone Agreement -- draws any impermissible legal or practical distinctions that allow only Pacific Bell and not others to enter the market for payphone services in the City's Central Business District. Accordingly, on the record before us, we find no basis to preempt the Ordinance pursuant to the Supremacy Clause . . . ." If the Commission is going to use *California Payphone*'s approach to interpreting Section 253(a), it should do so accurately and in full, and not by extracting the one word "inhibit" as if it were a synonym for "prohibit or effectively prohibit".